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CITATIONS

522635—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 787

L. MCLEOD, PETITIONER

v.

M. C. THRELKELD, J. H. THRELKELD, AND M. C. THRELKELD, JR., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

OPINION BELOW

The opinion of the District Court (R. 5–10) is reported in 46 F. Supp. 208. The opinion of the Circuit Court of Appeals (R. 11–13) is reported in 131 F. (2d) 880.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1942. A petition for a writ of certiorari, and a motion for leave to proceed *in forma pauperis,* were filed on March 4, 1943, and were granted on April 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether a cook who prepares and serves meals to maintenance-of-way employees of an interstate railroad, in a cook-and-dining car which travels along the railroad's rails, is engaged in commerce within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

The case was presented to the District Court on a stipulation of facts which may be summarized as follows:

Respondents, partners in the Threlkeld Commissary Company, have a contract with the Texas and New Orleans Railroad Company and with other railroad companies in several states (R. 1, 3, 7) to furnish meals and bedding to each railroad company's maintenance-of-way employees. The Texas and New Orleans Railroad Company is a common carrier engaged in interstate transporta-

tion. The Railroad Company's employees boarded by respondents are engaged in maintaining the railroad lines in proper condition for interstate transportation. Most, but not all, of such employees board with the respondents at prices which vary in accordance with the type of gang to which they belong. The Railroad Company is authorized in writing by the employees to make deductions from their wages and pay the respondents for the board and bedding furnished. (R. 1–2, 5–6.)

Meals served by respondents to the railroad maintenance-of-way employees are prepared and served in a cook-and-dining car. The car runs on the railroad's tracks and travels with a particular gang or outfit. Each car is in charge of a cook whose duty it is to cook and serve meals and to keep the car clean. Petitioner, during the period involved in this suit, worked exclusively at points along the railroad lines within Texas and did not go to other states (R. 2). If the maintenance-of-way employees are required to perform emergency work, the cook must follow the crew to the point at which the work is done. Petitioner was employed by respondents as a cook from July 1939 to May 1941, and performed the duties above described. (R. 2, 6.) [1]

[1] Some question was raised concerning whether petitioner served meals to persons other than railroad employees. The court found (R. 3–4) that although occasionally he did, this occurred so infrequently that for purposes of the cases petitioner would be deemed to have served only railroad employees.

The District Court held that although the Railroad Company, and its employees to whom petitioner furnished meals, were engaged in commerce (R. 8), neither petitioner nor respondents were so engaged within the meaning of the Act (R. 10). It therefore entered judgment for respondents (R. 10–11). The court below affirmed (R. 13).

ARGUMENT

A cook, employed to prepare and serve meals to railroad maintenance-of-way employees who are engaged in interstate commerce, is engaged in such commerce within the meaning of the Act, and his work is not exempt under Section 13 (a) (2)

A. Petitioner is "engaged in commerce" within the meaning of Sections 6 and 7 of the Act

This Court, in *Overstreet* v. *North Shore Corp.*, No. 284, this Term, decided February 1, 1943, held that in the decisions under the Federal Employers' Liability Act "A practical test of what 'engaged in interstate commerce' means has been evolved," and stated that there was "no persuasive reason why the scope of employed or engaged 'in commerce' laid down" in the Federal Employers' Liability Act cases "should not be applied to the similar language in the Fair Labor Standards Act."

Accordingly, *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, would seem decisive here. Its facts are virtually identical to those presented in the case at bar. In the *Smith* case, a mess cook preparing and serving meals for a railroad main-

tenance-of-way gang was held to be employed in interstate commerce within the meaning of the Federal Employers' Liability Act. As in the instant case, the cook in the *Smith* case worked in a railroad camp car which travelled to portions of the railroad company's lines with a crew of bridge carpenters engaged in making repairs. This Court pointed out that the cook's duties had the effect of forwarding the work of the railroad gang "by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had." Therefore "he [the cook] was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U. S. at 103–4.

No valid distinction can rest on the circumstance that in the *Smith* case, the employee involved was an employee of the railroad company. Cf. opinion below (R. 12). This Court held in *Pedersen* v. *J. F. Fitzgerald Construction Co.*, No. 396, this Term, decided February 8, 1943, petition for rehearing denied and judgment amended, March 8, 1943, that the decision in the *Overstreet* case applied to employees of a *contractor* engaged in the reconstruction and repair of railroad bridges. As this Court has repeatedly ruled, "The nature of the employer's business is not determinative, * * * the application of the Act depends upon the character of the employees'

activities." *Overstreet* v. *North Shore Corp., supra; Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* No. 336, this Term, decided January 18, 1943; *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, this Term, decided November 9, 1942.

The assumption by the Court below that the term "engaged in commerce" is to be construed more narrowly than the term "production for commerce" is mistaken.[2] This Court has held that coverage under the phrase "engaged in commerce" extends "throughout the farthest reaches of the channels of interstate commerce." *Overstreet* v. *North Shore Corp., supra; Walling* v. *Jacksonville Paper Co., supra.* The Court has also indicated that the scope of coverage under this phrase is commensurate with the scope of coverage under the phrase "production for commerce." Almost identical language has been used by the Court in defining the scope of the two terms. In *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525–526, work which "had such a close and immediate tie with the process of production for commerce" as to be "an essential part of it" was held to be "necessary to the production of goods

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[2] Both the Eighth and Ninth Circuit Courts of Appeals have held that cooks employed to prepare and serve meals for employees of lumber companies *producing* goods for interstate commerce are within the coverage of the Act. See *Hanson* v. *Lagerstrom,* 133 F. (2d) 120 (C. C. A. 8); *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101 (C. C. A. 9).

for commerce." Correspondingly, in the *Overstreet* case, the Court held that the term "engaged in commerce" includes work which "is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

B. Respondents' commissary car is not a "service establishment" within the meaning of the exemption provided in Section 13 (a) (2) of the Act

The Court below ruled that its view of the case made it unnecessary to express an opinion on the "persuasive contention" that respondent was a service establishment within the exemption provided by Section 13 (a) (2) of the Act (R. 13). We submit that the contention is not sound.

Section 13 (a) (2) exempts from the wage and hour provisions of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The commissary car upon which petitioner worked is used exclusively for the benefit of the railroad maintenance-of-way employees and to further the railroad's interstate transportation operations; it falls outside both the letter and purpose of these exemptive provisions.[3] The "service establishment" intended to

[3] The Administrator has expressed the view in Interpretative Bulletin No. 6, Wage Hour Division, United States Department of Labor, paragraph 40, revised June 1941, that employees working on a traveling commissary or camp car, which goes along with the working construction crew on a railroad right-of-way, are not within the exemption. Wage Hour Man. (1942), p. 337.

be exempted is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods," and whose "principal activity * * * is to furnish service to the consuming public." *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed 316 U. S. 517.[4] As the Circuit Court

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[4] The legislative history of the Act establishes that the exemption stemmed from a desire to protect small retailers selling directly to the general consuming public. The original bills contained no exemption for retail or service establishments. Section 2 (a) (7) of the Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, and by the House May 24, 1938, as Section 11 (a) (1), provided an exemption for employees working in a "local retailing capacity." But the apparent source of Section 13 (a) (2) was an amendment offered by Representative Celler excepting "any retail industry, the greater part of whose sales is in intrastate commerce" which he proposed in order to dispel all doubt as to the exemption of "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (83 Cong. Rec. 7437, 7438). The amendment passed the House but was not enacted.

The exemption, in substantially its present form, appeared for the first time in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, respectively. These drafts excepted "any employee engaged in any retail establishment the greater part of whose selling is in intrastate commerce." In the Conference Committee report dated June 11, 1938, the words "or service" and "or servicing" were added (H. Rept. 2738, 75th Cong., 3d sess.). The explanation of the exemption in the report merely repeated the language of Section 13 (a) (2) (Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, June 2, 1937, p. 32). The Conference Committees version of the bill was adopted by both Houses of Congress on June 14, 1938 (83

of Appeals for the Third Circuit pointed out "typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops" (*ibid.*). Correspondingly, typical "service establishments" are "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like." *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 107 (C. C. A. 9).

While an ordinary public restaurant would come within this classification, respondents' commissary car is wholly different. The commissary car is not located at readily accessible sites to attract the patronage of the consuming public and does not serve the general public. It is operated exclusively to provide food for the railroad's mobile work crews and constitutes an integral part of the main business of interstate transportation. It does not function nor is it operated as an ordinary restaurant. It does not cater to the public and it is not in competition with ordinary restaurants. The principal activity of the commissary car

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Cong. Rec. 9178, 9266–9267), three days after the language in question first appeared. The new language provoked no discussion on the floor of either the House or Senate. The absence of expression or comment upon the modification indicates that no far-reaching extension of the original exemption for retail establishments was contemplated by the last-minute addition of the words "or service."

"definitely was not to furnish service to the consuming public, as such, but was to serve the employees" engaged in maintaining the lines of the railroad company. Cf. *Consolidated Timber Co.* v. *Womack, supra,* at p. 107; *Hanson* v. *Lagerstrom,* 133 F. (2d) 120 (C. C. A. 8); see also *Walling* v. *Sondock,* 132 F. (2d) 77 (C. C. A. 5), certiorari denied, No. 683, March 8, 1943.

Even if it be assumed that respondents' commissary car were a "service establishment," the exemption would be unavailable, because the requirement of Section 13 (a) (2) that "the greater part of * * * [the] servicing [be] in intrastate commerce" is not satisfied, despite the fact that services rendered by the commissary car are all performed within Texas. Since the railroad company is engaged in interstate commerce (R. 8) and the work of the maintenance-of-way employees and the cook in the commissary car are part of that interstate commerce, the greater part, if not all, of the car's services is in interstate commerce. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Fleming* v. *Arsenal Bldg. Corp.,* 125 F. (2d) 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

CONCLUSION

Under the principles of the foregoing decisions, petitioner is engaged in commerce within the meaning of the Act, and is not exempted under Section 13 (a) (2). Therefore, the judgment of

the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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APRIL 1943.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

SEC. 13 (a) * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

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SUPREME COURT OF THE UNITED STATES.

No. 787.—October Term, 1942.

L. McLeod, Petitioner,
vs.
M. C. Threlkeld, et al., doing business as Threlkeld Commissary Company, a Partnership.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 7, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here for examination a judgment of the Circuit Court of Appeals for the Fifth Circuit, 131 F. 2d 880, which held that a cook, employed by respondents to prepare and serve meals to maintenance-of-way employees of the Texas and New Orleans Railroad Company, is not engaged in commerce under sections 6 and 7 of the Fair Labor Standards Act and therefore not entitled to recover for an alleged violation of that act.[1]

The respondents are a partnership with a contract to furnish meals to maintenance-of-way employees of the railroad, an interstate carrier. The meals are served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. The car is set conveniently to the place of work of the boarders and in emergencies follows the gang to the scene of its activities. Employees pay the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due and pay it over to the contractor. The petitioner worked as cook at various points in Texas along the line of the road during the period in question.

As the extent of the coverage by reason of the phrase "engaged in commerce" is important in the administration of the Fair Labor Standards Act, we granted certiorari, — U. S. —.

1 52 Stat. 1062-63. "Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

. . . . . .

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . ."

In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" was rejected in favor of the language, now in the act, "each of his employees who is engaged in commerce or in the production of goods for commerce."[2] Sections 6 and 7. See the discussion and reference to legislative history in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term, 1942. The selection of the smaller group was deliberate and purposeful.

McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause.[3] Our question is whether he was "engaged in commerce."[4] We have held that this clause covered every employee in the "channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term 1942, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not.[5] Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable

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[2] The distinction in the coverage arising from this choice of language was well known to Congress. Cf. National Labor Relations Act, 49 Stat. 448, 450. Labor Board *v.* Jones & Laughlin, 301 U. S. 1, 31 *et seq.*; Bituminous Coal Act of 1937, Sec. 4-A, 50 Stat. 72, 83; Agricultural Adjustment Act, 50 Stat. 246; Public Utility Holding Company Act of 1935, 49 Stat. 803 § 1(c).

[3] 52 Stat. 1061. "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

[4] Cooks employed to feed workers engaged in the production of goods for commerce have been held to be similarly engaged. Hanson *v.* Lagerstrom, 133 F. 2d 120; Consolidated Timber Co. *v.* Womack, 132 F. 2d 101.

[5] Walling *v.* Jacksonville Paper Co., supra; Higgins *v.* Carr Bros. Co., No. 97, October Term 1942.

waterways are "engaged in commerce." *Overstreet* v. *North Shore Corporation,* No. 284, October Term 1942. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen* v. *J. F. Fitzgerald Construction Co.,* No. 396, October Term 1942. Journal, Supreme Court of the United States, October Term 1942, p. 177.

In the present instance, it is urged that the conception of "in commerce" be extended beyond the employees engaged in actual work upon the transportation facilities.[6] It is said that this Court decided an employee, engaged in similar work was "in commerce," under the Federal Employers' Liability Act[7] and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.[8]

Judicial determination of the reach of the coverage of the Fair Labor Standards Act "in commerce" must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum* v. *Walling, supra,* 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments "in commerce" under the Fair Labor Standards Act.[9]

The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment,[10] we hope, is not to be repeated in the administration and operation of the Fair Labor

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[6] The contention that the work of the employee is covered by the exemption of Sec. 13(a)(2)—"any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"—seems without significance. If the work is in interstate commerce, the exemption does not apply. Compare Consolidated Timber Co. *v.* Womack, 132 F. 2d 101, 106, *et seq.;* Hanson *v.* Lagerstrom, 133 F. 2d 120.

[7] Phila., B. & W. R. R. Co. *v.* Smith, 250 U. S. 101. This case construed the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, § 1; "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages. . . ."

[8] Walling *v.* Jacksonville Paper Co., No. 336 October Term 1942; Kirschbaum *v.* Walling, 316 U. S. 517, 524.

[9] Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 558; Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74, 78; Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296; N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415, 419.

[10] Act of August 11, 1939, 53 Stat. 1404; Hearings, Senate Committee on the Judiciary, Amending the Federal Employers Liability Act, March 28 and 29, 1939, pp. 3-9, 26-30; S. Rep. No. 661, 76th Cong., 1st Sess.

Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation.[11] But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i. e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.[12]

The *Smith*[13] case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was "in commerce" this Court said:

"The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U. S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle, Industrial Commission* and *Bezue* cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as

11 Pedersen *v.* Del., Lack. & West. R. R., 229 U. S. 146, 151; cf. Overstreet *v.* North Shore Corp., No. 284, October Term 1942.

12 See the cases cited in note 9, *supra*.

13 Phila., B. & W. R. R. Co. *v.* Smith, 250 U. S. 101.

to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.[14] Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce."[15]

It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act.

Affirmed.

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[14] Thus we said as to a rate clerk employed by a motor transportation company:

"It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act, . . ." Overnight Motor Co. *v.* Missel, 316 U. S. 572, 575.

[15] 52 Stat. 1060-61.

Sec. 3. "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

. . . . . .

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Mr. Justice MURPHY, dissenting.

I think that petitioner is covered by the Fair Labor Standards Act.

In using the phrase "engaged in commerce" Congress meant to extend the benefits of the Act to employees "throughout the farthest reaches of the channels of interstate commerce". *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567. We recently construed the phrase to include employees whose activities are so closely related to interstate commerce "as to be in practice and in legal contemplation a part of it." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 129, 130, 132. This practical test was derived from cases such as *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146, 151, and *Phila., B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, construing similar language in the Federal Employers' Liability Act.[1] The activities of petitioner in cooking for a traveling maintenance crew of an interstate railroad are sufficient to satisfy this test. It was so held in the *Smith* case, 250 U. S. 101, the facts of which are virtually identical with the instant case except for the immaterial difference that petitioner here was employed by an independent contractor rather than by the railroad itself.[2] The reasoning of the *Smith* case is persuasive and should control this one.

The opinion of the Court, however, rejects the concept of coverage used in the *Smith* case for the narrower test of whether an employee is engaged "in interstate transportation or in work so closely related to it as to be practically a part of it", used in another line of cases under the Federal Employers' Liability Act.[3] I think this is wrong for several reasons.

The Fair Labor Standards Act extends to employees "engaged in commerce", not merely to those engaged in transportation.[4] As the *Bolle* case itself points out: "Commerce covers the whole field

[1] Act of April 22, 1908, 35 Stat. 65, as it was before the amendment of 1939, 53 Stat. 1404. 45 U. S. C. § 51 *et seq.*

[2] The application of the Fair Labor Standards Act, of course, depends upon the character of the employees' activities, not the nature of the employer's business. Overstreet *v.* North Shore Corp., 318 U. S. 125, 132, and cases cited.

[3] Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 558; Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S 74; Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296; N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415.

[4] The Act defines "commerce" as: "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U. S. C. § 203.

of which transportation is only a part''. 284 U. S. at 78. Hence, whatever basis there may have been for restricting the coverage of the Federal Employers' Liability Act to employees actually engaged in transportation because of the fact that the Act applied only to those working for employers engaged in interstate transportation by rail,[5] can have no possible application or bearing on the interpretation of the Fair Labor Standards Act. The coverage of this Act is much more extensive. It is not limited to employees of interstate carriers but extends generally to employees engaged in all kinds of commerce, including transportation. Nothing in the Act suggests that it has a narrower application to employees whose work ''in commerce'' is transportation or work connected therewith, than it has to employees who are engaged in commerce but whose work has nothing to do with transportation. Such a construction is untenable because it would discriminate without reason between different types of employees, all of whom fall within the same general statutory classification of ''engaged in commerce''.

The necessary effect of rejecting the *Smith* case for the restrictive concept of ''in commerce'' which was used in the *Shanks*,[6] *Bolle*,[7] *Commission*,[8] and *Bezue*[9] cases is to introduce into the administration of the Fair Labor Standards Act that concededly undesirable confusion which characterized the application of the Federal Employers' Liability Act and prompted the 1939 amendment (53 Stat. 1404) which in effect repudiated the narrow test of the *Shanks* line of cases. The reality of this confusion is readily demonstrable. We have held that a rate clerk employed by an interstate motor carrier[10] and a seller of tickets on a toll bridge over which interstate traffic moves[11] are both ''engaged in commerce'' within the meaning of the Fair Labor Standards Act. Yet in the view of the majority of the Court when the employees' activities are in the field of transportation, the Act apparently will not cover[12] those who work

5 See Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74, 78.

6 279 U. S. 556.

7 284 U. S. 74.

8 284 U. S. 296.

9 284 U. S. 415.

10 Overnight Motor Co. *v.* Missel, 316 U. S. 572.

11 Overstreet *v.* North Shore Corp., 318 U. S. 125.

12 This is discussed wholly apart from the question of the applicability of § 7 because of the exemption contained in § 13(b)(1) of the Act. See Southland Gasoline Co. *v.* Bayley, — U. S. —, No. 581 this Term.

in an interstate carrier's repair shop on facilities to supply power for machinery used in repairing instrumentalities of transportation,[13] or who heat cars and depots used by interstate passengers,[14] or who store fuel for the use of interstate vehicles,[15] or who work on such vehicles when withdrawn for the moment from commerce for repairs.[16] The anomaly of this is clear—there is no sound reason for extending the benefits of the Act to a rate clerk employed in the office of an interstate motor carrier and denying them to the janitor who keeps the office clean and warm, or the employee who works in the carrier's shop on machinery used to repair interstate vehicles, or on the vehicles themselves.

If the applicable provision were "engaged in the production of goods for commerce" instead of "engaged in commerce", our decisions make it clear that employees such as the janitor and the shop tender and probably petitioner would be within the Act. Cf. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88.[17] The phrase "engaged in commerce" should be as broadly construed. In the words of one of the Act's sponsors, the phrase extends to "employees who are a necessary part of carrying on" a business operating in interstate commerce.[18] Petitioner's work was evidently considered necessary to the operation of the railroad, else it would have made no provision for boarding its maintenance crews. We have cast the revelant tests for determining the scope of the two phrases of coverage in substantially similar language. In *Kirschbaum Co.* v. *Walling,* work which "had such a close and immediate tie with the process of production for commerce" as to be "an essential part of it" was held to be "necessary to the production of goods for commerce". 316 U. S. at 525-26. Correspondingly,

[13] Cf. Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556.

[14] Cf. Chicago & N. W. Ry. Co. *v.* Bolle, 284 U. S. 74.

[15] Cf. Chicago & E. I. R. Co. *v.* Commission, 284 U. S. 296.

[16] Cf. N. Y., N. H. & H. R. Co. *v.* Bezue, 284 U. S. 415.

[17] Employees cooking for workers engaged in the production of goods for commerce have been held to be similarly engaged and covered by the Act. Consolidated Timber Co. *v.* Womack, 132 F. 2d 101; Hanson *v.* Lagerstrom, 133 F. 2d 120.

[18] Speaking for the Senate conferees on the Conference Report, Senator Borah said: " . . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec. 9170.

in *Overstreet* v. *North Shore Corp.*, we held that the phrase "engaged in commerce" includes work which "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' ". 318 U. S. at 130. The purpose of the "production of goods for commerce" phrase was obviously not to cut down the scope of "engaged in commerce", but to broaden the Act's application by reaching conditions in the production of goods for commerce which Congress considered injurious to interstate commerce. See *United States* v. *Darby*, 312 U. S. 100. The effect of the Court's decision today, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it, when the employee's activities are in transportation or connected therewith, to the narrow and legislatively repudiated view of the *Shanks, Bolle, Commission* and *Bezue* cases. Such an unbalanced application of the statute is contrary to its purpose of affording coverage broadly "throughout the farthest reaches of the channels of interstate commerce" to employees "engaged in commerce".

The judgment should be reversed.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.

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